Office-Supreme Court, U.S.
FILED
MAR 26 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1349 (2)

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1984

JERRY T. BUSTO,
Petitioner,

vs.

MARTIN MARIETTA CORPORATION,
A MARYLAND CORPORATION,
Respondent.

On Writ of Certiorari from the Colorado Court of Appeals

BRIEF IN OPPOSITION

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STATUTES INVOLVED IN THE CASE

1. Rule 97 of the Colorado Rules of Civil Procedure

RULE 97. CHANGE OF JUDGE

A judge shall be disqualified in an action in which he is interested or prejudiced, or has been of counsel for any party, or is or has been a material witness, or is so related or connected with any party or his attorney as to render it improper for him to sit on the trial, appeal, or other proceeding therein. A judge may disqualify himself on his own motion for any of said reasons, or any party

may move for such disqualification and a motion by a party for disqualification shall be supported by affidavit. Upon the filing by a party of such a motion all other proceedings in the case shall be suspended until a ruling is made thereon. Upon disqualifying himself, a judge shall notify forthwith the chief judge of the district who shall assign another judge in the district to hear the action. If no other judge in the district is available or qualified, the chief judge shall notify forthwith the court administrator who shall obtain from the Chief Justice the assignment of a replacement judge.

2. Rule 38(d) of the Colorado Appellate Rules

RULE 38. SANCTIONS

(d) *Sanctions for Frivolous Appeal.* If the appellate court shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

3. 28 U.S.C. § 1912 (1982)

§ 1912. *Damages and costs on affirmance*

Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs.

STATEMENT OF THE CASE

Petitioner, Jerry T. Busto ("Busto") provided a statement of the case to this Court in his petition for certiorari review. Respondent, Martin Marietta Corporation ("Martin"), does not dispute Busto's characterization of the history of the case. The only fact Martin does dispute is Busto's assertion that the record does not reflect a ruling on his motion for a change of judge.

Busto correctly informs this Court that he filed a motion for a change of judge on or about June 30, 1982. However, Busto falsely asserts that the record is void of any ruling on the motion. The

record reflects that the judge to whom Busto objected, Judge Perricone, disqualified himself and that a different judge, Judge Lilly, presided at the trial. This ruling is reflected in the trial transcript at the outset of the trial (See Appendix to Petition, p. A-17) and at the conclusion of the trial. (See Appendix A).

Busto filed his notice of appeal at the conclusion of the trial. Busto subsequently filed a preliminary statement and a brief, neither of which presented a federal due process issue. (See Appendices B and C). Though Busto raised an issue concerning his motion for a change of judge, he questioned the requirements of Rule 97 of the Colorado Rules of Civil procedure and not procedural due process requirements. Moreover, Busto raised no issue concerning the court's powers to adjudicate an issue involving patents. Even if he had raised this issue, the proceedings below involved trade secrets and not a patent.

On March 26, 1984, seven days prior to scheduled oral arguments before the Colorado Court of Appeals, counsel for Martin filed, and served upon counsel for Busto, a motion for sanctions in which it requested recovery of its attorneys' fees and costs. (See Appendix D). Counsel for both Busto and Martin presented arguments to the court on this issue. The court of appeals subsequently affirmed the judgment against Busto and awarded attorneys' fees and double costs to Martin.

ARGUMENT

I. The petition for writ of certiorari should be dismissed for lack of jurisdiction.

Busto bases all three issues presented in his petition for a writ of certiorari on the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution. Busto fails to show that either of the first two issues, whether constitutional due process requires a hearing on a motion to disqualify a judge and whether a decision by a state court regarding patents violates federal due process requirements, was ever presented for review in State court.

The only issue that Busto raised previously was whether the finding by the Colorado Court of Appeals that his appeal to that court was frivolous, and its resulting award of legal fees incurred on appeal violated due process because of an allegedly vague standard of frivolity and purported lack of adequate notice. Even if properly preserved, this issue raises no substantial federal question.

A. This Court lacks jurisdiction to review issues not properly raised in previous proceedings.

Busto alleges jurisdiction under 28 U.S.C. § 1257 (1982). This statute allows a petitioner to seek certiorari review if, in the state court, the petitioner has "specially set up or claimed under the Constitution . . . of . . . the United States" the right or claim the petitioner wishes the Court to address. 28 U.S.C. § 1257(3) (1982), *construed in Webb v. Webb*, 451 U.S. 493 (1981). Failure to raise the federal question in the proceedings below compels dismissal of the petition for lack of jurisdiction. *Webb v. Webb*, 451 U.S. 493 (1981).

This Court's refusal to grant certiorari to decide issues not properly raised or addressed in the state courts preserves important constitutional concerns. In the *Webb* case, this Court likened the "properly-raised-federal-question" doctrine to the exhaustion of state remedies requirement applicable to federal habeas corpus review of constitutional claims of state prisoners. *Webb*, 451 U.S. at 500. In so doing, this Court emphasized the underlying policy as being one based on "federal-state comity," in which federal courts will not upset a state court's ruling, without first giving the state court the opportunity to pass upon the federal issue. *Webb*, 451 U.S. at 500, *citing Picard v. Connor*, 404 U.S. 270 (1971).

Busto fails to show that the state courts of Colorado had any opportunity to pass upon the first two due process issues he now raises in his petition. Busto bears the burden of establishing juris-

diction. Sup. Ct. R. 21.1(h). In fact, the record shows that Busto did not present either the first or second issue in any of the proceedings below.

Petitioner's first issue, whether federal due process requires a hearing on a motion for a change of judge,[1] has never been raised in the context of federal due process requirements. Rather, Busto alleged error based on the language of Rule 97 of the Colorado Rules of Civil Procedure. (See Appendices B and C).

In his brief to the Colorado Court of Appeals, Busto framed the issue as follows:

> a. The trial judge failed to rule on the Defendant's Motion for a Change of Judge under Rule 97, C.R.C.P., although timely filed and to the Defendant's prejudice.

This statement of the issue, and the succeeding argument, make no mention of procedural due process, state or federal. Busto did not assert a specific hearing requirement. Instead, he questioned whether the Rule required a specific *ruling* on the motion, despite the fact that transfer to a different judge appears from the record. (See Appendix B). Busto similarly phrased the issue in his petition for a writ of certiorari to the Colorado Supreme Court. (See Appendix C).

Busto's second issue, whether the Jefferson County District Court violated petitioner's due process rights by purportedly deciding a matter regarding patents, likewise finds no mention among the alleged errors presented to the Colorado appellate

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[1]This first issue also presents the question of whether Rule 97 of the Colorado Rules of Civil Procedure requires a hearing. This question is clearly not a federal question. Moreover, the Colorado Supreme Court has ruled on this precise issue, and held that Rule 97 does *not* require a hearing. *Brouwer v. District Court of the First Judicial District*, 169 Colo. 303, 455 P.2d 207 (1969).

courts. (See Appendices B and C). No state court ever ruled upon the issue, nor did petitioner ever present the issue for resolution.[2]

Busto's failure properly to raise and preserve issues for appeal precludes him from obtaining review of those issues by this Court. Busto's first two issues should be dismissed for lack of jurisdiction.

B. Busto's objection to the assigned judge was rendered moot by the fact that a different judge heard the case.

Even if Busto properly raised a due process issue regarding his request for assignment of the case to a different judge in the proceedings below, the fact that Busto obtained a different judge rendered this issue moot. The Jefferson County District Court was guilty of, at most, a technical error, which had no prejudicial effect on the rights of Busto. The Colorado Court of Appeals so held. (See Appendix to Petition, p. A-2).

Moreover, contrary to the assertions of Busto, the record reflects the fact that Judge Perricone had "disqualified himself." (See Appendix A). At the outset of the trial, Judge Lilly informed Busto that he had "assignment to a different judge as he had requested." (See Appendix to Petition, p. A-17). Certiorari review cannot be justified based on the mere absence of a minute order granting Busto's motion to disqualify, where the record shows that Busto got the relief that he requested.

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[2]Even if Busto had asserted a jurisdictional defense on the basis that the federal courts have exclusive jurisdiction to decide matters involving the validity of a patent, the defense would have been inapplicable to the issues actually presented in the case below. Martin sought to enjoin Busto from violating his employment agreement and common law duties by divulging trade secrets and to declare the parties' respective rights in the subject technology. (See Appendix E).

C. A determination by a state court that an appeal is frivolous, thus entitling the prevailing party to recover double costs and legal fees pursuant to the state's procedural rules, does not present a federal question.

Federal due process requires that a person may not be deprived of life, liberty or property without due process of law. U.S. Const. amend. V and amend. XIV, § 3. Busto presents a constitutional issue only if the Colorado Court of Appeals did not provide sufficient procedural safeguards before imposing sanctions, or utilized an impermissibly vague standard. Before the imposition of sanctions against a litigant, the litigant must be given "fair notice and an opportunity for a hearing on the record." *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980).

The record shows that Busto received fair notice. Counsel for Martin filed a motion for sanctions on or about March 26, 1984, a copy of which was mailed to counsel for Busto on that day. (See Appendix D). This motion requested the Colorado Court of Appeals to award Martin its attorneys' fees and double costs on the ground that Busto's appeal was frivolous. The motion further indicated that counsel for Martin would be prepared to address the issue of sanctions at argument before the court which was set for April 3, 1984. Busto has acknowledged that he received this motion seven days prior to oral argument (See Petition, p. 11). The due process requirement of "fair notice" cannot require more.

Busto admittedly had an opportunity to be heard on the issue of sanctions. (See Petition, p. 11). Busto's counsel did, in fact, argue it. (See Appendix to Petition, p. A-3). Busto's claim of total surprise regarding this opportunity to be heard, directly contradicted by statements of the court (See Appendix to Petition, p. A-3), and by Martin's motion for sanctions, is disingenuous, and an imposition on this Court.

Busto also argues that the standard of frivolity to which the court held him accountable suffers from unconstitutional vagueness. This contention completely lacks merit.

Busto cites *International Technical Instruments, Inc. v. Engineering Measurements Co.*, 678 P.2d 558 (Colo. App. 1983), as support for his allegation that Rule 38(d) of the Colorado Appellate Rules is unconstitutionally vague. (See Petition, pp. 11-12). This case does not support his claim. Rather than declaring "frivolous" to be a vague standard, the Colorado Court of Appeals upheld a definition of this term that had been applied by a trial court. The court's opinion contains no implications that the standard of "frivolous", prior to this definition, was unconstitutionally vague.

Even if the standard of "frivolous" contained in Rule 38(d), Colo. App. R., is deemed to be facially vague, that vagueness has been cured by state court constructions. *See Mission Denver Co. v. Pierson*, 674 P. 2d 363 (Colo. 1984). When a state court has construed a state statute or regulation, and that construction removes the statutory vagueness, this Court has held that the state court's construction is binding. *State of Minnesota ex rel. Pearson v. Probate Court of Ramsey County*, 309 U.S. 270 (1940). The Colorado Supreme Court has construed the statute so as to overcome Busto's vagueness challenge.

In *Mission Denver Co.*, cited above, the Colorado Supreme Court adopted a definition of "frivolous" to be applied in cases involving Rule 38. Specifically, that court held "that an appeal should be considered frivolous if the proponent can present no rational argument based on the evidence or law in support of a proponent's claim or defense, or the appeal is prosecuted for the sole purpose of harassment or delay." *Mission Denver Co.*, 674 P.2d at 366. The Colorado Court of Appeals applied this standard to Busto's appeal, as appears from its opinion. (See Appendix to Petition, p. A-4). Busto's vagueness challenge must fail.

CONCLUSION

Martin respectfully requests this Court to impose sanctions upon Busto pursuant to 28 U.S.C. § 1912 (1982) and this Court's inherent powers. 28 U.S.C. § 1912 empowers this Court to award damages and single or double costs, if the Court determines that an appeal is frivolous. *See Betz v. United States*, No. 84-1816, slip op. (10th Cir. Jan. 22, 1985) (interprets 28 U.S.C. § 1912 to allow federal courts of appeal to impose sanctions for frivolous appeals). In addition, courts have the inherent power to impose sanctions on litigants and their counsel to deter frivolous filings. *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980).

Busto's petition for a writ of certiorari is frivolous. Busto failed to raise and preserve his first two issues in the previous proceedings. In addition, his first issue was rendered moot due to the fact Busto obtained the relief for which he claims he was denied due process. Busto's final issue does not present a federal question. The Colorado Court of Appeals complied with federal due process standards and the challenged rule is not vague due to state court construction. Busto's claim of lack of notice is demonstrably false.

Martin respectfully requests that Busto's petition for a writ of certiorari be denied and that Martin be awarded its attorneys' fees and costs, which Martin will establish by affidavit, or otherwise as this Court may direct.

Respectfully submitted,

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APPENDIX "A"

DISTRICT COURT
COUNTY OF JEFFERSON
STATE OF COLORADO

Case No. 80-CV-3763

REPORTER'S TRANSCRIPT

MARTIN MARIETTA CORPORATION,
Plaintiff,

v.

JERRY T. BUSTO,
Defendant.

The Trial in this matter commenced on Tuesday, July 6, 1982, before the HONORABLE JOSEPH LILLY, Judge of the District Court.

FOR THE PLAINTIFF: JOHN R. WEBB (1876)

FOR THE DEFENDANT: PRO SE JERRY T. BUSTO

Excerpts from Transcript

THE COURT: We haven't decided the question of costs.

MR. WEBB: There is one other matter I'd like to raise with Your Honor, too, since Judge Perricone did not hear the trial, you pointed out the matter of costs.

THE COURT: Perhaps. I don't think Judge Perricone wants to pass on that since Judge Perricone disqualified himself and since I heard the trial. Maybe denial of new trial ought to wait decision of costs first, don't you think?

MR. WEBB: Perhaps, Your Honor, and the related question of attorney fees under 13-17-101.

THE COURT: I'm going to show this. Strike that Order on the motion for new trial. I'm just going to show it was filed this date.

And do you want to set a day for the decision of the matter of costs and attorney fees now?

MR. WEBB: I would prefer to, Your Honor.

THE COURT: All right. What day do you have in mind?

MR. WEBB: Basically, the sooner the better and we can get it all wrapped up next Monday or Tuesday.

THE COURT: It's all right with me. Does that meet with your approval, Mr. Busto?

APPENDIX "B"

In The
COURT OF APPEALS
For The State Of Colorado

No. 82 CA 0892

MARTIN MARIETTA CORPORATION, a Maryland Corporation, *Plaintiff-Appellee,* *vs.* JERRY T. BUSTO, *Defendant-Appellant.*	APPEAL FROM THE DISTRICT COURT OF THE COUNTY OFJEFFERSON No. 80-CV-3763 IN TRIAL COURT THE HONORABLE GASPAR PERRICONE JOSEPH LILLY JUDGES

BRIEF OF THE DEFENDANT-APPELLANT

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Excerpts from Brief

II. THE TRIAL COURT ERRED IN NOT RULING ON THE DEFENDANT-APPELLANT'S MOTION FOR A CHANGE OF JUDGE AND SUBSEQUENTLY SELECTING ITS SUCCESSOR AND PROCEEDING TO TRIAL.

Rule 97 C.R.C.P. (Addendum B) specifically states that "upon the filing by a party of such motion all other proceedings in the case shall be suspended until a ruling is made thereon." Mr. Busto filed a Motion for Assignment to a Different Judge supported by affidavit on June 30, 1982, (Record Index P. 102–104). A ruling by the then trial judge was never entered of record, the case was assigned to another judge and the trial proceeded on July 6, 1982. Since no ruling was ever entered, the trial should have been suspended until a ruling was made on Mr. Busto's motion. Such an action is required by Rule 97 C.R.C.P. Rule 97 was enforced by the Colorado Supreme Court, *en banc*, in *Leone Co. v. Dist. Court*, 150 Colo. 47, 48 (1962). In the *Leone* case the trial court ruled on other matters after a motion under Rule 97 had been filed and before a ruling on the motion under Rule 97 had been filed and before a ruling on the motion was made by the trial court. The petitioner filed an original action in the Supreme Court asking that all further proceedings be stayed until the trial court ruled on the Rule 97 motion. The Supreme Court in its ruling stated that "the rule is, therefore, made absolute in part and the trial court is ordered to suspend all proceedings other than to rule upon the motion to disqualify. . . ." This position was reaffirmed by the Colorado Supreme Court, *en banc*, in the case of *Brouwer v. District Court of First Judicial District*, 455 P.2d 207 (1969). In this particular case, a ruling was immediately made upon the motion. The motion was denied. The Supreme Court in upholding the denial of the motion without hearing stated "R.C.P. Colo. 97 does not require a hearing on such a motion but rather requires that all other proceedings in the case shall be suspended until a ruling is made thereon. The court ruled thereon and, therefore, it did not lose jurisdiction to proceed." Mr. Busto's filing of his Motion for Assignment of Case to a Different Judge

under Rule 97 C.R.C.P. "had the effect, as a matter of law, of suspending any further proceedings until the judge ruled on the motion to disqualify." *City of Trinidad v. District Court, etc.*, 581 P.2d 304 (1978 *en banc*). The trial court being without jurisdiction to proceed, its judgment is void and should be vacated and remanded for a new trial after a ruling on Mr. Busto's motion has been entered. *V.T.A., Inc. v. Airco, Inc.*, 597 F.2d 220 (10th Cir. 1979); *Weaver Const. Co. v. District Court in and for El Paso County, 4th Judicial District*, 545 P.2d 1042 (Colo. 1976); *In re Marriage of Stroud*, 631 P.2d 168 (Colo. 1981).

The record is silent as to how Judge Lilly received the case in question after Mr. Busto filed his motion to disqualify. While Appellant's counsel herein was not involved with the proceedings at that time, Plaintiff-Appellee's counsel who was involved then stated in his Preliminary Statement, filed with this court, under Issues to be Raised on Appeal subparagraph (a) that "Judge Perricone transferred the case to Judge Lilly for trial." By leaving the motion pending and undetermined, the charge of bias and prejudice, even though unproven or defective, remains as an accusation of unfitness to proceed with the case, and logically this charge of unfitness would extend to unfitness to pick his successor or assign the case to another judge. Additionally, if a judgment rendered by a disqualified judge is void or voidable, 49 C.J.S. Judgment § 17(b), then it must necessarily follow that a judgment rendered by a successor judge in a case wrongfully assigned to him by the disqualified judge is also void or voidable. Therefore, if the statement in Appellee's Preliminary Statement is true and the record is void of evidence to the contrary, Rule 97 was violated twice in that it calls for assignment of cases to be made by the Chief Judge after disqualification of the trial judge.

APPENDIX "C"

SUPREME COURT, STATE OF COLORADO

No.

PETITION FOR WRIT OF CERTIORARI

MARTIN-MARIETTA, a Maryland corporation, *Plaintiff-Appellee,* *vs.* JERRY T. BUSTO, *Defendant-Appellant.*	APPEAL FROM THE DISTRICT COURT OF JEFFERSON COUNTY HONORABLE GASPAR PERRICONE, JUDGE JOSEPH LILLY, JUDGE COURT OF APPEALS CASE NO. 82CA0892, DIVISION II OPINION BY JUDGE VAN CISE JUDGES SMITH and BERMAN PARTICIPATING

ISSUES PRESENTED FOR REVIEW

1. Does C.R.C.P. 97 mandate that a trial judge affirmatively enter on the record a ruling on a Motion for Disqualification and is failure to comply a jurisdictional defect.

Excerpts from Petition

ARGUMENT IN SUPPORT OF PETITION FOR CERTIORARI

This Petition presents an important question of first impression concerning the construction of C.R.C.P. 97 as promulgated

by this Court. The interpretation to be given Rule 97 could have a major impact on important judicial and public policies underlying Rule 97 as enunciated by this Court.

1. On numerous prior occasions this Court has been called upon to interpret and give enforcement to the language of C.R.C.P. 97 and it is necessary for this Court to do so again.

This Court has clearly held that the requisites of C.R.C.P. 97 are of jurisdictional magnitude. Thus, when a trial court fails to abide by the requisites of Rule 97 it loses jurisdiction of the case and any action or judgment entered thereafter is void. *Leone Co. v. District Court,* 150 Colo. 47, 48 (1962); *Brouwer v. District Court of First Judicial District,* 455 P.2d 207 (Colo. 1969); *City of Trinidad v. District Court, etc.,* 581 P.2d 304 (Colo. 1978); *V.T.A., Inc. v. Airco, Inc.,* 597 F.2d 220 (10th Cir. 1979); *In re Marriage of Stroud,* 631 P.2d 168 (Colo. 1981). Rule 97 has further been interpreted so as not to require a hearing on a motion thereto. *See, Brouwer Supra.* The language of Rule 97 is clear, it mandates a trial court to make a ruling on a motion for disqualification or the Court loses jurisdiction until it does. *See,* Rule 97 attached hereto as Appendix A. This Court has held such a mandate does exist in Rule 97 and a writ of mandamus may lie as a remedy to compel compliance by the trial court of its *duty* to make a ruling. *See, City of Trinidad Supra; Walker v. People,* 248 P.2d 287, 293 (Colo. 1952).

The question which arises in the factual context of this case is unique to all other reported cases concerning Rule 97. In its basic context it can be stated as "what constitutes a ruling for Rule 97 purposes or can a ruling be implied from a silent record." It is the Appellant's contention, that a ruling concerning a Rule 97 disqualification motion must affirmatively appear of record. A ruling as required by mandate of Rule 97 cannot materialize or be fabricated by ienuendo [*sic*] from a totally silent record. While the opinion of the Court of Appeals fails to squarely address

the issue, by implication of its holding to the facts of this case, the only principal that can be drawn from its opinion is that no ruling need appear of record. Thus, a ruling by silence or implication is sufficient to satisfy the mandate of Rule 97.

Were this Court to allow the Court of Appeals holding to stand, it would seriously undermine the policies underlying Rule 97 as set forth in the recent decision of *Holland v. District Court*, 674 P.2d 952 (Colo. 1984). In *Holland*, this Court in addressing a matter concerning the same motion before the same judge as appears here, held that the right of a party to a hearing before a fair and impartial tribunal is basic to our system of justice and therefore, *not only the actuality of fairness* but the *appearance of fairness* as well, must concern the courts. Therefore, courts must *meticuously* [*sic*] *avoid any* appearance of partiality in order to maintain public confidence in judicial integrity.

The Court of Appeals decision here stands for the proposition that since Judge Perricone did not preside at trial he must have disqualified himself and therefore, no prejudice was incurred by Mr. Busto. The fallacies with applying that type of rationale to Rule 97 are several. First, perhaps Judge Perricone did not disqualify himself but only had a scheduling conflict. Secondly, perhaps Judge Perricone did not disqualify himself but chose to pick an alternate Judge to keep from having to disqualify himself. Thirdly, if that line of reasoning is used in a situation such as this, where a motion for disqualification is filed against a judge and he doesn't rule on the motion but ultimately doesn't preside over subsequent proceedings, it must also be applied to a situation where a motion for disqualification is filed and the trial judge again doesn't rule on the motion but does preside over subsequent proceedings. In which case the moving party, attempts to bring an action to compel a ruling. The trial judge or opposing party need only reply that it can be implied from the fact that the trial judge still presides that a ruling denying the motion was entered or meant to be entered. That being the case, the moving party would

have no means to attack or challenge the courts' inaction or ruling. Lastly, it causes the parties to the action to be forced to play a wait and see game with the Courts. A party files his motion to disqualify and then is compelled to wait and see what happens. If the judge continues in the proceeding, you can assume he denied your motion but if another judge appears at the next proceeding, you can assume he granted your motion. Such a procedure which the Court of Appeals in its ruling herein invites, is simply not conducive to fundamental notions of fair play and substantial justice as has been held to be contained in the basic concept of due process of law. The Court by not openly dealing with a motion for disqualification leaves the motion pending and undetermined with the charge of bias and prejudice, even though unproven or defective, remaining as an accusation of unfitness by the Court. In doing so, the Court invites error and doubt resulting in public confidence and judicial integrity withering away in speculation and conjecture. The Court in allowing the procedure of the of the [*sic*] trial court in this case to go uncorrected sanctions such conduct and deprives Mr. Busto due process of law. Every procedure which would offer a possible temptation to the average man as judge denies the individual due process of law. *Tumey v. Ohio*, 273 U.S. 510, 532 (1927).

It is Appellant's contention that the Court of Appeals should not have assumed as fact something which does not appear of record (the disqualification) and base its ruling thereon (no prejudice no error). *See, Smith v. Davis*, 45 S.E.2d 237, 240 (Ga. App. 1947); 5 *C.J.S. Appeal and Error* § 1534 p. 1051. It has been held that failure to comply with the provision of a mandatory legal directive constitutes error per se and must be deemed to be prejudicial. *Ferderer v. Northern Pacific Ry. Co.*, 26 N.W.2d 236, 241 (N.D. 1947).

In the same context, arises the question of how did Judge Lilly come to preside over the trial. Rule 97 provides that "upon disqualifying himself, a judge shall notify forthwith the chief judge

of the district who shall assign another judge in the district to hear the action. Judge Lilly was a judge from another district (Denver) not the 1st Judicial District. Was Judge Lilly assigned by the chief judge of the 1st Judicial District or was he assigned by or at Judge Perricone's request. A judge against whom a motion for disqualification is filed may not select his successor or assign the case to another judge. *Aaberg v. District Court*, 319 P.2d 491 (Colo. 1957).

It is the Appellant's contention that the record presented to the Court of Appeals affirmatively showed error. The disregard of a mandatory legal directive and should be held to constitute excess jurisdiction of the court, error per se and deemed to be prejudicial. *See Colorado Appellate Practice—Anatomy of an Appeal*, p. 41, CLE in Colo. 1982. The decision rendered by the Court of Appeals runs contra to the policies enunciated by the Court in *Holland* and a long line of cases construing Rule 97, as well as, due process of law. For the reason above stated, this Court should exercise its discretionary power and grant Appellant's Petition for Writ of Certiorari.

APPENDIX "D"

In The

COURT OF APPEALS

For The State Of Colorado

Case No. 82 CA 0892

MARTIN MARIETTA CORPORATION,
Plaintiff-Appellee,

v.

JERRY T. BUSTO,
Defendant-Appellant.

MOTION FOR SANCTIONS

Pursuant to Colorado Appellate Rule 38(d), plaintiff-appellee Martin Marietta Corporation respectfully moves the Court to award damages, in the amount of attorneys' fees incurred on appeal, and double costs, on the basis that this appeal is frivolous.

This appeal is at issue, and has been set for argument on Tuesday, April 3, 1984. At the argument, counsel will be prepared to respond to any questions by the court concerning the propriety of sanctions.

HOLMES ROBERT & OWEN
JOHN R. WEBB

Attorneys for plaintiff-appellee Martin Marietta
1700 Broadway, Suite 1800
Denver, CO 80290
(303) 861-7000

CERTIFICATE OF MAILING

The undersigned hereby certifies that on this 26th day of March, 1984, service of motion for sanctions was effected by placing a true copy thereof in the United States mail, postage prepaid, addressed as follows:

Thomas W. Koelling, Esq.
1112 N. Wasatch Ave.
Colorado Springs, CO 80903

APPENDIX "E"

IN THE DISTRICT COURT

IN AND FOR THE COUNTY OF JEFFERSON

STATE OF COLORADO

Civil Action No._____

Courtroom_____

MARTIN MARIETTA CORPORATION, a Maryland corporation, *Plaintiff,* *v.* JERRY T. BUSTO, *Defendant.*	VERIFIED COMPLAINT FOR PRELIMINARY AND PERMANENT INJUNCTION

Plaintiff Martin Marietta Corporation ("Martin") complains against defendant Jerry T. Busto ("Busto") as follows.

1. Martin is, and at all times pertinent has been a Maryland corporation authorized to do business in the State of Colorado, having its principal Colorado facility in Jefferson County.

2. Plaintiff is a resident of the State of Colorado, County of Jefferson, residing at 790 Depew, Lakewood, Colorado 80214.

3. At all times pertinent prior to December 1, 1980, Martin employed Busto, most recently as a technician.

4. During 1979, and perhaps somewhat earlier, in connection with Busto's employment by Martin, Busto acquired knowledge

of a process for extending the life of carbon electrodes used in the electrical manufacture of steel, by application of a coating to the electrodes (the "subject technology").

5. The subject technology is proprietary to Martin due to its development by persons in Martin's employ, who were hired by Martin to invent, and who, at various times, were specifically assigned duties related to development of the subject technology.

6. The subject technology has not been patented by Martin and, to Martin's knowledge, has not been otherwise patented.

7. The subject technology constitutes a trade secret insofar as (a) its existence is not known outside of Martin, either to the general public or to persons, other than Martin, engaged in related work, (b) its existence is known only to a small number of Martin employees, (c) Martin has taken measures to guard its secrecy, (d) it would have great value to Martin's competitors, and (e) it could not be developed without either substantial investment of resources or improper and unlawful use of the work of Martin.

8. The subject technology has a potential commercial value of several million dollars.

9. Disclosure of the subject technology, before it can be patented, would cause Martin immediately to suffer irreparable injury because disclosure would destroy the trade secret status of the subject technology and could preclude its being successfully patented by Martin.

10. In connection with his employment by Martin, Busto and Martin entered into an agreement, (a true and correct copy of which is attached hereto as Exhibit A), whereby Busto agreed to preserve the confidentiality of Martin's proprietary information.

11. On or about December 3, 1980, John G. Taussig, Jr., Esq., on Busto's behalf, sent to at least five officers of Martin a packet

containing a demand letter and settlement proposal concerning various disputes between Busto and Martin, a 14 page narrative statement entitled "liability," a 14 page verified complaint (not yet filed) and copies of business records of Martin, including a two page "idea report B." (True and correct copies of the December 3, 1980 letter and of the draft complaint are attached hereto as Exhibits B and C.)

12. The "liability" statement and the "idea report B" contain information about the subject technology sufficient to destroy the status of the subject technology as a trade secret and to preclude its patentability by Martin, if the contents of these documents were further disclosed, such as by including the "idea report B" as an exhibit to a court filing.

13. As the owner of the subject technology, Martin has an affirmative legal duty, in the face of threatened disclosure, to take steps necessary to preserve the status of the subject technology as a trade secret.

14. Martin is entitled to a preliminary and permanent injunction forbidding Busto from further disclosure of information related to the subject technology.

WHEREFORE, plaintiff Martin Marietta Corporation prays for judgment in its favor and against defendant Jerry T. Busto in the form of a preliminary and permanent injunction forbidding Busto, under pain of contempt, from disclosing any information acquired by Busto during the course of his employment related to processes for preserving the carbon electrodes used in steel manufacturing.

HOLME ROBERTS & OWEN
RICHARD L. SCHREPFERMAN (0648)
JOHN R. WEBB (1876)

Attorneys for Plaintiff
1700 Broadway, Suite 1800
Denver, Colorado 80290
(303) 861-7000

Address of Plaintiff:
P.O. Box 179
Denver, Colorado 80201

VERIFICATION

COUNTY OF JEFFERSON
STATE OF COLORADO } ss.

Phillip L. DeArment, affiant herein, being duly sworn on oath, deposes and says that, by virtue of his position as Assistant Patent Counsel to Martin Marietta Corporation, Denver Aerospace Division, he has personal knowledge of, and is competent to testify concerning the allegations of the foregoing verified complaint, and that said allegations are true and correct to the best of his information and belief.

_____

Phillip L. DeArment

Subscribed and sworn to before me this day of December, 1980.

My commission expires:

_____

Notary Public

IN THE DISTRICT COURT

IN AND FOR THE COUNTY OF JEFFERSON

STATE OF COLORADO

Civil Action No. 80-CV-3763, Division 2

MARTIN MARIETTA CORPORATION, *Plaintiff,* *v.* JERRY T. BUSTO, *Defendant.*	AMENDED COMPLAINT

Plaintiff Martin Marietta Corporation ("Martin") submits the following amended complaint pursuant to Rule 15(a), Colo. R. Civ. P., on the basis that no responsive pleading to Martin's verified complaint for preliminary and permanent injunction has been filed by defendant Jerry T. Busto ("Busto").

COUNT I—PRELIMINARY AND PERMANENT INJUNCTION

Martin incorporates by reference herein and realleges each and every allegation of paragraphs 1 through 14 of the verified complaint for preliminary and permanent injunction filed herein.

COUNT II—DECLARATORY JUDGMENT

15. Martin incorporates by reference herein the allegations of paragraphs 1 through 6, 8, 10 and 11 of Count I.

16. This count arises under Rule 57, Colo. R. Civ. P., and C.R.S. 13-15-101 *et seq.* (1973), and is in the nature of a prayer for a declaratory judgment.

17. Martin and Busto are persons interested under, and whose legal relations are affected by the "employee patent and confidential information agreement," Exhibit A to the verified complaint, as well as to at least one predecessor agreement.

18. An actual controversy has arisen between Martin and Busto concerning rights in the subject technology including rights that Martin contends are established in its favor by the agreements described in paragraph 17 above.

19. Martin is entitled to a declaratory judgment establishing the validity of the agreements described in paragraph 17 above, and Martin's complete ownership of the subject technology thereunder, to the exclusion of any claim by or interest of Busto in the subject technology.

WHEREFORE, plaintiff Martin Marietta Corporation prays for judgment in its favor and against defendant Jerry T. Busto, for all relief sought in the initial verified complaint, for a declaratory judgment establishing the validity of the above described agreements and Martin's complete ownership of the subject technology thereunder, for interest, costs, attorneys' fees and such other and further relief as this Court deems just.

HOLME ROBERTS & OWEN
RICHARD L. SCHREPFERMAN (0648)
JOHN R. WEBB (1876)

Attorneys for Plaintiff
1700 Broadway, Suite 1800
Denver, Colorado 80290
(303) 861-7000

CERTIFICATE OF MAILING

The undersigned hereby certifies that service of AMENDED COMPLAINT was effected by placing a true copy thereof in the United States mail, postage prepaid, addressed as follows:

John G. Taussig Jr., Esq.
2260 Baseline
Boulder, Colorado 80302

Date: January 16, 1981

No. 84-1349

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1984

JERRY T. BUSTO, *Petitioner*

v.

MARTIN MARIETTA CORPORATION, *Respondent*

AFFIDAVIT OF SERVICE

STATE OF COLORADO }
COUNTY OF DENVER } ss:

I, John R. Webb, depose and say that I am an attorney in the office of Holme Roberts & Owen, attorney of record for Martin Marietta Corporation, the Respondent herein, and that on March 25, 1985, pursuant to Rule 28.3, Rules of the Supreme Court, I served three copies of the foregoing Brief in Opposition on Petitioner, Jerry T. Busto, the petitioner herein, by mailing the copies in a duly addressed envelope, with first class postage prepaid to 790 Depew Street, Lakewood, Colorado 80214.

All parties required to be served have been served.

Subscribed and sworn to before me on March 25, 1985.

Notary Public

My Commission Expires Sept. 30, 1986